UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: All Auto Parts Cases	2:12-MD-02311-MOB-MKM
THIS DOCUMENT RELATES TO: ALL AUTO PARTS CASES	**Oral Argument Requested**

THE PARTIES' RESPONSE TO TOYOTA'S OBJECTIONS TO AND MOTION TO MODIFY THE SPECIAL MASTER'S ORDER REGARDING THE PARTIES' RENEWED MOTION TO COMPEL DISCOVERY FROM CERTAIN NON-PARTY ORIGINAL EQUIPMENT MANUFACTURERS AND THEIR AFFILIATED ENTITIES

ISSUE PRESENTED

1. Whether the Special Master properly compelled production of information coming from or belonging to non-defendant suppliers notwithstanding Toyota's confidentiality agreements with these suppliers, when the Stipulated Protective Order in this litigation sufficiently protects any confidential or proprietary information pertaining to the non-defendant suppliers?

   Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Conley v. Aggeler,
2006 WL 461343 (W.D. Mich. Feb. 24, 2006)

E3 Biofuels, LLC v. Biothane Corp.,
2013 WL 3778804 (S.D. Ohio July 18, 2013)

Hanas v. Inner City Christian Outreach Ctr., Inc.,
2007 WL 551609 (E.D. Mich. Feb. 20, 2007)

In re Bankers Trust Co.,
61 F.3d 465 (6th Cir. 1995)

Liberty Folder v. Curtiss Anthony Corp.,
90 F.R.D. 80 (S.D. Ohio 1981)

Medical Waste Technologies L.L.C. v. Alexian Bros. Medical Center, Inc.,
1998 WL 387706 (N.D. Ill. June 24, 1998)

The Parties[1] respectfully submit this response to Toyota's Objections to and Motion to Modify the Special Master's Order Regarding the Parties' Renewed Motion to Compel Discovery from Certain Non-Party Original Equipment Manufacturers and Their Affiliated Entities (ECF No. 1603).

Toyota objects to Section II.B.g of the Special Master's Order (ECF No. 1584). Section II.B.g governs the production of RFQ-related and pricing information that the OEMs received from non-defendant suppliers. Section II.B.g requires that notice and a ten-day period be given to the non-defendant suppliers for them to object before the relevant production is made. Toyota claims that, without consent of the suppliers or a non-appealable court order, it is contractually obliged to hold confidential the non-defendant suppliers' proprietary information which would include the suppliers' RFQ submissions and pricing information. Toyota further seeks to mask the identities of the non-defendant suppliers whose information is subject to production as an "added protection."

Toyota has failed to set forth any reasonable basis for the relief sought. Specifically, Toyota does not challenge the relevance of the non-defendant supplier information, nor does it contend that the information sought is legally privileged. Indeed, none of the Six Lead OEMs objected to the Special Master's substantive ruling that information relating to non-defendant suppliers should be produced. The only basis that Toyota offers for its objection—without citing any legal support—is the confidentiality provision in its contracts with suppliers.

A concern for protecting confidentiality does not equate to privilege. Private confidentiality agreements cannot shield legitimate discovery of responsive information and documents that are in the possession and control of Toyota. Courts have repeatedly and

[1] The "Parties" joining in this Response include End-Payor Plaintiffs ("EPPs"), Truck and Equipment Dealer Plaintiffs ("TEDPs"), the State of Florida, the State of Indiana, and certain non-settled Defendants in *Automotive Parts Antitrust Litigation*, No. 2:12-md-02311-MOB-MKM (E.D. Mich.).

expressly rejected the argument that contractual confidentiality obligations prevent disclosure in a discovery context because of the policy in favor of broad pretrial discovery set forth in the Federal Rules of Civil Procedure. "If entities involved in litigation were able to shroud all of their documents with 'confidentiality agreements' which prevented their disclosure, our system of discovery would become nothing but a sham." *Medical Waste Technologies L.L.C. v. Alexian Bros. Medical Center, Inc.*, No. 97-C-3805, 1998 WL 387706, at *6 (N.D. Ill. June 24, 1998) (plaintiff must disclose a Credit Suisse/First Boston document sought by defendants despite a confidentiality agreement). "[C]onfidentiality is not a recognized basis for withholding discovery." *Hanas v. Inner City Christian Outreach Ctr., Inc.*, No. CIV.A. 06-CV-10290-DT, 2007 WL 551609, at *1–2 (E.D. Mich. Feb. 20, 2007) (rejecting defendant's argument that information should be withheld due to its confidential nature); *cf. In re Bankers Trust Co.*, 61 F.3d 465, 470 (6th Cir. 1995) (holding that a government agency could not override the application of the Federal Rules and prevent production of otherwise discoverable information even when it has prescribed regulations that preclude disclosure of such information); *see also Conley v. Aggeler*, No. 1:05-CV-406, 2006 WL 461343, at *2 (W.D. Mich. Feb. 24, 2006) (acknowledging that a party "could not avoid his discovery obligations on the basis of contractual confidentiality agreements"); *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 02-C-7345, 2003 WL 22682361, at *1 (N.D. Ill. Nov. 12, 2003) (ordering production of financial records despite defendant's argument that disclosure would breach its merchandising agreement with a third party); *Channelmark Corp. v. Destination Prods. Int'l, Inc.*, No. 99-C-214, 2000 WL 968818, at *2 (N.D. Ill. July 7, 2000) (affirming magistrate judge's order compelling deposition testimony about prior litigation despite confidentiality provision of settlement agreement).

Confidential business information is customarily made available under a protective order. The purpose of the federal rules governing protective orders is to facilitate discovery by shielding from disclosure trade secrets and other confidential business information, thereby encouraging parties apprehensive about the disclosure of such information to cooperate in discovery. *E3 Biofuels, LLC v. Biothane Corp.*, No. 1:12-MC-76, 2013 WL 3778804, at *3

(S.D. Ohio July 18, 2013) ("This court has routinely approved proposed protective orders seeking to protect both 'confidential' and 'highly confidential/attorney eyes only' material when, in addition to trade secret or other confidential research, development, or commercial information, particularly sensitive information of a similar nature may be disclosed through discovery and would cause competitive harm if publicly revealed"). Here, the Stipulated Protective Order filed in the Master Docket provides appropriate safeguards. *See* Stipulation and Protective Order Governing the Production and Exchange of Confidential Information, Master File No. 2:12-md-02311, ECF No. 200 (July 10, 2012).

To be clear, Section II.B.g of the Special Master's Order does not preclude the Parties from further negotiating a narrower list of non-defendant suppliers for production if appropriate, once Toyota identifies all its suppliers in the "Lead Two Part Cases" (*Bearings* and *AVRP*) for which it has responsive data and information. Under Section II.B.g, the non-defendant suppliers who are notified of the contemplated production would then have a fair opportunity to object within ten days from the time of notice. Any concerns a non-defendant supplier may have regarding the disclosure of any sensitive or proprietary information can be addressed under the protective order by limiting who may access the disclosed information and how the disclosed information may be used. By contrast, Toyota's proposed modification, which requires consent from the identified non-defendant suppliers without placing a reasonable time limit on providing such consent, is contrary to well-accepted discovery principles, has no added value of efficiency, and will create further (and likely indefinite) delay in producing the relevant information that the Parties seek. Undeniably, it is the non-defendant suppliers, not Toyota, that have the confidentiality rights and standing to assert any objections.

Likewise, Toyota's request to further disguise the non-defendant suppliers' identities is unwarranted and impractical. The non-defendant suppliers' identities are likely to reveal information relevant to the experts' analyses and are important for the Parties to fully utilize non-defendant suppliers' information as a benchmark to determine the existence or nonexistence of any conspiracy or overcharge. Moreover, since the OEMs do not have the ability to coordinate

production, different OEMs may choose different naming conventions for the same non-defendant supplier under Toyota's proposal (*e.g.*, "Bearings Supplier A" in Toyota's production and "Bearings Supplier Y" in another OEM's production for the same supplier), rendering the data useless for any cross-OEM comparison. Even within the same OEM's data, the Parties have learned from the 30(b)(6) depositions that different names for the same supplier may have been used over time as well as at the same point in time. Further, multiple subsidiaries or plants of the same supplier may also have been treated differently from OEM to OEM. Removing these essential identifiers and having each OEM re-designate at its election would cripple the Parties' ability to properly interpret any data that are provided. Further, as mentioned above, the desire of Toyota and the suppliers for secrecy does not trump the Parties' need for relevant information in this litigation. Although information submitted by suppliers (including their identities) during the tendering process may be deemed confidential, it is unreasonable for Toyota to claim that such information would remain confidential indefinitely barring disclosure after a reasonable period of time. The Stipulated Protective Order is the proper device to adequately safeguard any confidential or sensitive business information. *See, e.g., Liberty Folder v. Curtiss Anthony Corp.*, 90 F.R.D. 80, 83 (S.D. Ohio 1981) (ordering production of supplier and customer lists and noting that the protective order can be designed to resolve the conflict between the legitimate need of a party for prompt, thorough disclosure and the genuine interest of a company in preserving the confidentiality of commercial information).

For these reasons, the Parties respectfully request that Court overrule Toyota's objection and deny its motion to modify Section II.B.g of the Special Master's Order.

Dated: January 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I caused the foregoing THE PARTIES' RESPONSE TO TOYOTA'S OBJECTIONS TO AND MOTION TO MODIFY THE SPECIAL MASTER'S ORDER REGARDING THE PARTIES' RENEWED MOTION TO COMPEL DISCOVERY FROM CERTAIN NON-PARTY ORIGINAL EQUIPMENT MANUFACTURERS AND THEIR AFFILIATED ENTITIES to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ E. Powell Miller
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